LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 28 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 23

B. A. REYNOLDS, ETC., ET AL.,
Appellants,

vs.

M. O. SIMS, ET AL.,
Appellees.

No. 27

DAVID J. VANN AND ROBERT S. VANCE,
Appellants,

vs.

BETTYE FRINK, SECRETARY OF STATE OF THE STATE OF ALABAMA, ET AL.,
Appellees.

No. 41

JOHN W. McCONNELL, JR., ET AL.,
Appellants,

vs.

BETTYE FRINK, SECRETARY OF STATE OF THE STATE OF ALABAMA, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF FOR APPELLEES, M. O. SIMS, ET AL.

CHARLES MORGAN, JR.
736 Bank for Savings Bldg.
Birmingham 3, Alabama

GEORGE PEACH TAYLOR
927 Brown-Marx Bldg.
Birmingham, Alabama

Attorneys for Appellees, M. O. SIMS, ET AL.

BIRMINGHAM PRINTING COMPANY — PH. 324-1181 — SEPTEMBER 28, 1963

INDEX

	Page
Statement of the Case	2
Question Presented	2
Summary of Argument	3
Argument	
I. The District Court had jurisdiction to declare void the existing apportionment of the Alabama Legislature and to order an apportionment to "release the stranglehold."	3
II. The apportionment of the Alabama Legislature under the then existing law and the Legislative acts was "invidously discriminatory."	4
III. District Courts may employ the doctrine of "all deliberate speed" in the effecting of legislative reapportionment.	10
Conclusion	11

Cases Cited

Baker v. Carr, 369 U. S. 186	3, 4
Brown v. Board of Education, 349 U. S. 294	10
Davis v. Schnell (D.C. Ala.) 81 F. Supp. 872, aff'd per curiam 336 U. S. 933	9
Gomillion v. Lightfoot, 364 U. S. 339	9
Gray v. Sanders, —— U. S. ——, 83 S. Ct. 801	4
In re *Opinion of Justices*, 209 Ala. 593, 96 So. 487	7
In re *Opinion of Justices*, 254 Ala. 177, 47 So. 2d 655	7
In re *Opinion of Justices*, 254 Ala. 183, 47 So. 2d 713	8
In re *Opinion of Justices*, 263 Ala. 158, 81 So. 2d 881	7, 8
State v. Hester, 260 Ala. 566, 72 So. 2d 61	7

Statutes Cited

Constitution of Alabama of 1901, Section 284 6

References Cited

Official Proceedings, Constitutional Convention 1901, Vol. 3, page 3913 7

Supreme Court of the United States

OCTOBER TERM, 1963

No. 23

B. A. REYNOLDS, ETC., ET AL.,
Appellants,

vs.

M. O. SIMS, ET AL.,
Appellees.

No. 27

DAVID J. VANN AND ROBERT S. VANCE,
Appellants,

vs.

BETTYE FRINK, SECRETARY OF STATE OF THE STATE OF ALABAMA, ET AL.,
Appellees.

No. 41

JOHN W. McCONNELL, JR., ET AL.,
Appellants,

vs.

BETTYE FRINK, SECRETARY OF STATE OF THE STATE OF ALABAMA, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF FOR APPELLEES, M. O. SIMS, ET AL.

CHARLES MORGAN, JR.
736 Bank for Savings Bldg.
Birmingham 3, Alabama

GEORGE PEACH TAYLOR
927 Brown-Marx Bldg.
Birmingham, Alabama

Attorneys for Appellees, M. O. SIMS, ET AL.

STATEMENT OF THE CASE

Appellees, fourteen citizens of the United States of America and the State of Alabama, and residents of Jefferson County, instituted the litigation now before this Court in Nos. 23, 27 and 41. After hearing the evidence and arguments of counsel for various parties and intervenors, the District Court found that appellees had been denied the Equal Protection of the Law by continued malapportionment of the Alabama Legislature, declared that the then existing apportionment and that proposed by the Alabama Legislature were invalid, ordered and effected a new apportionment and retained jurisdiction for further action in the event that no proper reapportionment was made by the Legislature elected in accordance with the Court order. *Sims v. Frink*, 208 F. Supp. 431.

Appeals were taken by two Probate Judges of Alabama (No. 23) (hereinafter termed Appellants), and by two sets of intervenors (Nos. 27 and 41) (hereinafter distinguished as Intervenor-Appellants).

This Court noted probable jurisdiction on June 10, 1963, and ordered consolidation of the three appeals. *Reynolds v. Sims*, ——— U.S. ———; 83 S. Ct. 1692.

QUESTION PRESENTED

Appellees join with Intervenors Farr, Hopping, Ryan and Morgan in their statement that the only question presented is:

May a three-Judge District Court order partial reapportionment of a State Legislature so as to "loosen the stranglehold" and, retaining jurisdiction, reasonably await possible action by the State Legislature before proceedings to final, complete relief?

SUMMARY OF ARGUMENT

The District Court relying upon *Baker v. Carr*, 369 U. S. 186, held that it had jurisdiction of the matters alleged in the complaint. The soundness of that decision was scarcely attacked by Appellants. Its holding is affirmed by Appellees.

The apportionment of the Alabama Legislature existing at the time of the filing of the Complaint was invidiously discriminatory, as admitted by all parties in the District Court and on appeal.

The legislative acts presented to the District Court as compliance with the Alabama Legislature's mandate under both state and federal law was clearly inadequate. Both the Crawford-Webb Bill and the 67 Senator Amendment violated the clear duty of the Legislature. As permanent reapportionment they were void. As a temporary step toward true reapportionment, the House provisions of the latter and the Senate provisions of the former were acceptable.

The District Court proceeded cautiously and with obvious reluctance. It attempted to release the stranglehold by a reapportionment injunction. It admitted the shortcomings of the court plan. But it retained jurisdiction to grant full relief if the reapportioned Legislature balked again. This was no error, but an exercise of judicial discretion. The deliberate speed of this District Court should be commended and the decree affirmed.

ARGUMENT

PROPOSITION I. THE DISTRICT COURT HAD JURISDICTION TO DECLARE VOID THE EXISTING APPORTIONMENT OF THE ALABAMA LEGISLATURE AND TO ORDER AN APPORTIONMENT TO "RELEASE THE STRANGLEHOLD."

The District Court noted in its opinion of April 14, 1962, on the hearing of the Application for Interlocutory Injunction that under *Baker v. Carr*, 369 U. S. 186, it had jurisdiction of the action.[1] In its opinion of July 21, 1962, the District Court reaffirmed its jurisdiction.[2]

Appellants in No. 23 persist in challenging jurisdiction and by mere generalities seek to overturn *Baker*.

Of course, the clear enunciation of jurisdiction in *Baker* was reiterated in *Gray v. Sanders*, ——— U. S. ———, 83 S. Ct. 801.

That jurisdiction exists is clear.

PROPOSITION II. THE APPORTIONMENT OF THE ALABAMA LEGISLATURE UNDER THE THEN EXISTING LAW AND THE LEGISLATIVE ACTS WAS "INVIDIOUSLY DISCRIMINATORY."

(a) The Then Existing Apportionment

The District Court noted in its opinion of July 21, 1962, that:

> "It has been generally conceded throughout this litigation by all the parties that the present apportionment of both Houses of the Legislature of the State of Alabama constitutes "invidious discrimination" in violation of the Equal Protection Clause of the Fourteenth Amendment."[3]

Appellants apparently also concede this, for no where in their brief is there any attempt to justify the then existing apportionment.

(b) The Crawford-Webb Apportionment

[1] R. 62, 63.
[2] R. 141.
[3] R. 144.

The House provisions of the Crawford-Webb Bill deprived large counties of the representation to which they are clearly entitled under any standard method of fairness. The equal proportions method results in the apportionment presently existing. Appellants admit to no rational explanation for the House apportionment.

The Senate apportionment proposal was also a failure insofar as compliance with the requirements of the Alabama and Federal Constitutions are concerned. The previously existing Senate was controlled by 25.1% of the people of Alabama. The Crawford-Webb apportionment placed control in the hands of a mere 27.6% of the people. The Senate is controlled by fewer people than reside in the State's two largest counties. Nineteen counties assigned by the Crawford-Webb bill to two and three county districts each have larger populations than live in the smallest district.[1] Six Senatorial districts have less than one-half of the number of people required by the Alabama Constitution.

In the Crawford-Webb Senate the vote of a citizen in the Bibb and Perry County District is worth twenty times that of a citizen of Jefferson County. The vote of citizens in the six smallest districts is worth fifteen or more times that of such Jefferson residents. In twenty-two districts, citizens have eight or more times as much representation as citizens residing in Jefferson. The representatives of a majority of the people do not have enough votes to prevent the creation of additional counties (twelve) or to defeat constitutional amendments (fifteen).

There is, therefore, no rational explanation of the Senate redistricting plan under the Crawford-Webb bill. Senate seats were allocated by the whims and personal pleasure of

[1] Bibb and Perry, population: 31,715—61,620 short of the perfect district of 93,335.

the Legislators, not by geography, political unit, population, or other scheme discernible to Appellants or, for that matter, Intervenor Appellants.

But, whether by whim or for personal pleasure or not the Crawford-Webb Senate apportionment improved, no matter how slightly, the apportionment of the Alabama Senate. Indeed, the District Court noted the probable inadequacy of the change when it stated:

> "As a piece of permanent legislation the provisions of the "Crawford-Webb Act" both as to the Senate and as to the House are totally unacceptable."[1]

(c) The 67 Senator Apportionment

The last sentence of Section 284, Alabama Constitution of 1901, as amended, provides:

> "Members in the Legislature shall be based upon population, and such basis of such representation shall not be changed by constitutional amendment."

The meaning of the above sentence and intention of the framers of the Alabama Constitution of 1901 is quite clear. The author of that provision, Mr. Coleman of Greene County, a delegate to the Constitutional Convention of 1901, clearly explained its purpose when he said to the Convention:

> "Now the great reason some provision of this kind should appear either here or in the report of the Committee on Representations is this: When the Convention assembles as a Convention, of course it can change this provision as it sees proper. When you submit an amendment to the Constitution to the people, on one single question, it can never be presented in all its force and with all its merits. *This simply provides that it shall not be altered by a simple amendment*

[1] R. 154

made to the Constitution. It should always remain upon a population basis until another Constitutional Convention shall be called, when it can then properly consider all these protections and provisions which are necessary." [Emphasis supplied][1]

Mr. Coleman's sentiments have been echoed by other representatives including those from the so-called "Black Belt" counties.[2]

The present Justices of the Alabama Supreme Court appear to condemn the validity of the 67 Senator proposal. While opinions of the Justices, elicited by the Legislature or by the Governor under the terms and provisions of Sections 34-36, inclusive, Title 13, Code of Alabama (1940) (recomp. 1958), result in no judgment or decree and are not binding on the Court, they are indicative of the judgment of the individual Justices.[3] Two previous opinions have been issued with respect to the population provision of the Alabama Constitution. In the first, Justices Brown, Livingston, Lawson and Simpson expressed their individual judgments as follows:

"The power to propose amendments to the Constitution is not inherent in the legislative department, and in the absence of a provision in the Constitution conferring such power on the legislature, it has no capacity thus to initiate amendments. Where, however, by the Constitution, the legislative department is authorized to submit amendments to the Constitution, its authority in that regard is restricted only by the limitations contained in that instrument and by the prohibitions of the Federal Constitution. 16 Corpus Juris Secundum, Constitutional Law, Sect. 9, Page 37; *Johnson v. Craft*, 205 Ala. 386; 87 So. 375. See, *Collier v. Frierson*, 24

[1] Official proceedings, Constitutional Convention 1901, Vol. 3, Page 3913.
[2] See In re *Opinion of the Justices*, 263 Ala. 158, 81 So. 2d 881, at 889, et seq.
[3] See In re *Opinion of the Justices*, 209 Ala. 393, 96 So. 487; In re *Opinion of the Justices*, 254 Ala. 177, 47 So. 2d 655; In re *Opinion of the Justices*, 267 Ala. 110, 100 So. 2d 565; and *State v. Hester*, 260 Ala. 566, 72 So. 2d 61.

Ala. 100; In re *Opinion of the Justices*, 222 Ala. 355, 133 So. 457.

> The official proceedings of the Constitutional Convention of 1901 (see Vol. 3, Official Proceedings, Constitutional Convention of 1901, pages 3906-3924) clearly disclose the purpose of the convention to withhold from the legislature the authority to propose amendments to the organic law which would effectively *change the basis of representation in the legislature*. Unquestionably, the above quoted provision of section 284, supra, withholds from the legislature the power and authority to initiate amendments to the Constitution which would have the effect of changing the basis of representation in the legislature to other than a population basis."[1]

In re *Opinion of the Justices*, 263 Ala. 158, 81 So. 2d 881, Justice Simpson apparently altered his previous position indicating his judgment that the last sentence of Section 284 could be deleted from the Constitution by constitutional amendment. Of the present membership of the Supreme Court of Alabama, only Justice Merrill joined Justice Simpson in this view. Chief Justice Livingston and Justices Lawson and Goodwin each maintained the view that as a matter of State law the last sentence of Section 284 could not be deleted from the Constitution by constitutional amendment. Of the present Court, it should be noted that neither Justice Harwood nor Justice Coleman has expressed a view with respect to this matter.

Under the so-called "67 Senator Amendment," the scheme of Senate districting cannot be termed geographical, since Baldwin County, containing 1,613 square miles, receives one Senator as does Etowah County, containing 555 square miles, the remaining counties of the State making up a jagged "crazy quilt." Nor can this scheme of districting be

[1] In re *Opinion of the Justices*, 254 Ala. 183, 47 So. 2d 713, at 714.

justified on the basis of population in that Jefferson County with 634,864 people is allocated one Senator as is Coosa County with 10,726 people, the ratio of representation being almost 60 to 1. A varying "crazy quilt" representation pattern with respect to remaining counties, is the rule rather than the exception.

Under the 67 Senator Plan control of the Senate by 25.1% of the population as formerly existed would be reduced to a cancerous deathgrip held by 19.4% of the people. Absolute control of the Senate would thereby be vested in fewer persons than reside in a single county of the state.

The only conceivable rationalization of the standard or classification of the 67 Senator Amendment is that it is based on political units of the State. But counties are political units created by the Legislature with no powers save those granted by the Legislature.

Gomillion v. Lightfoot, 364 U. S. 339; is an instance where another creature of the Alabama Legislature was struck down because of the use of political unit boundaries to deprive citizens of their right to be represented in their government.

The adoption of the 67 Senator Amendment made the intention of the Legislature most clear. The 67 Senator Amendment was a bald-faced attempt at the utilization of presently existing gerrymander lines to deprive Plaintiffs and other similarly situated of their right to vote. It has been held that a majority of the citizens of Alabama do not have a right by constitutional amendment to deprive a minority of their right to the franchise. This was settled in *Davis v. Schnell*, (D. C. Ala.) 81 F.Supp. 872, aff'd per curiam, 336 U. S. 933, and *Gomillion v. Lightfoot*, supra. A minority has no greater right to deprive the majority of their right to have their vote at least equally reflected in the

state's law making, tax levying and revenue spending body.

The 67 Senator Amendment's distribution of Senate seats was based upon nothing more than the capricious will of an invidiously malapportioned legislature.

PROPOSITION III. DISTRICT COURTS MAY EMPLOY THE DOCTRINE OF "ALL DELIBERATE SPEED" IN THE EFFECTING OF LEGISLATIVE REAPPORTIONMENT.

Intervenor Appellants argue that "Pernicious and destructive minority rule has been imposed on the people of Alabama in the name of the United States Constitution by a United States District Court."[1]

The Court below discharged its duty to Plaintiffs and the people of Alabama in a manner which, up to the date of that Court's decision, was unheard of. On a temporary basis and in order to break the "stranglehold" on the legislature, the District Court actually caused the holding of a legislative election in accordance with the injunction it issued. It served notice on all Alabama that the United States District Court fully intended to vindicate the voting rights of the Plaintiffs and every other Alabama citizen, and it told the Legislature to get about the business of changing the representative basis of Alabama democracy.

Since *Brown v. Board of Education*, 349 U. S. 294, District Courts in the South have constantly faced a chorus of discordant assault. In *Brown*, the problem of remedy was as present as in *Baker*. There "all deliberate speed" was enjoined upon the District Court for the enforcement of an order of law that was, at best, to be afforded a tortuous pathway to fruition. The Supreme Court there granted a one year delay prior to the fastening of remedies. District Courts

[1] Brief in No. 27, page 24.

were there granted an opportunity for moving forward the constitutional guarantee of freedom and equality. Again, in *Baker*, this Court moved to correct the sundering of the Republic into stagnant pools of non-responsive, non-democratic government. Again as in *Brown*, the District Court for the Middle District of Alabama responded to the call of the Constitution.

In impatience, Intervenor Appellants accuse the District Court of imposing the yoke of minority rule upon the people; and, even more than that they contend that there has been a permanent plan of reapportionment in Alabama when, in the District Court's own words:

> "It is this Court's further intention to retain jurisdiction of this case and defer any hearing on plaintiffs' motion for a final injunction until the Legislature, as provisionally reapportioned by this order, has an opportunity to provide for a true reapportionment of both Houses of the Alabama Legislature. The Court hopes that the moderate steps taken by this order may be enough to break the strangle hold. They certainly will not suffice as any permanent reapportionment. If they should prove insufficient to break the strangle hold, the Court remains under the solemn duty to relieve the plaintiffs and other citizens like situated from further denial of the equal protection of the laws. That much must be accomplished before there can be a final disposition of this case."[1]

Intervenor Appellants attack the only institution to which freedom in Alabama has been entrusted. The District Court should be granted the right to finish the job.

CONCLUSION

Involved in the case presented to the District Court by Appellees and necessarily in this appeal is the most basic

[1] R. 155, 156.

and fundamental liberty born of our democratic system—representation in a legislative body which makes the law, levies the taxes, incurs the public debt and spends the public revenue. Appellees represent the millions of Alabamians who have long been deprived of fair and equal representation. Denied relief over the years by all state agencies, Appellees turned to the judiciary. The Alabama District Court gave temporary relief. It should be permitted to continue.

These several appeals should be dismissed and the decree affirmed.

Respectfully submitted,

CHARLES MORGAN, JR.
736 Bank for Savings Bldg.
Birmingham 3, Alabama

GEORGE PEACH TAYLOR
927 Brown-Marx Bldg.
Birmingham, Alabama

CERTIFICATE OF SERVICE

I, George Peach Taylor, one of the attorneys for Appellees as a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of September, 1963, I served copies of the foregoing Brief on the several appellants and other Appellees by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record as follows:

THOMAS G. GAYLE
1104½ Water Avenue
Selma, Alabama

JOSEPH E. WILKINSON, JR.
310 Broad Street
Selma, Alabama

MCLEAN PITTS
15 Broad Street
Selma, Alabama

RANKIN FITE
Hamilton, Alabama

JOHN W. MCCONNELL, JR.
1101 Merchants National Bank Building
Mobile, Alabama

DAVID J. VANN
2100 City Federal Building
Birmingham, Alabama

ROBERT S. VANCE
1703 City Federal Building
Birmingham, Alabama

C. H. ERSKINE SMITH
First National Building
Birmingham, Alabama

JEROME A. COOPER
1025 Bank for Savings Building
Birmingham, Alabama

GEORGE PEACH TAYLOR